STATE OF VERMONT
BOARD OF MEDICAL PRACTICE

In re:	)	**MPC 15-0203**	**MPC 110-0803**
	)	**MPC 208-1003**	**MPC 163-0803**
David S. Chase,	)	**MPC 148-0803**	**MPD 126-0803**
	)	**MPC 106-0803**	**MPC 209-1003**
Respondent.	)	**MPC 140-0803**	**MPC 89-0703**
	)	**MPC 122-0803**	**MPC 90-0703**
	)		**MPC 87-0703**

REPLY MEMORANDUM IN SUPPORT OF MOTION TO REINSTATE LICENSE AND TO DISMISS SUPERCEDING SPECIFICATION OF CHARGES

Respondent, David S. Chase, M.D., through counsel, submits the following Reply Memorandum in support of his Motion to Reinstate License and to Dismiss Superceding Specification of Charges.

I. Introduction.

The State has statutory, ethical, and constitutional obligations to ensure that Dr. Chase receives a fair hearing from the Board before he is deprived of his livelihood by a license suspension. Yet, when confronted with undisputed evidence of misconduct by the Board's investigator and unethical conduct by the Assistant Attorney General, the State has responded with little more than a shrug and a series of insults.

Rather than directly addressing Dr. Chase's straightforward arguments in favor of reinstatement and dismissal, the State has filed an Opposition long on invective, hyperbole, and irrelevant personal attacks, but short on fact, law, and logic. It attempts to divert attention from the proven misconduct of its investigator and attorney by restating, again and again, the undisputed fact that Dr. Chase is currently facing multiple, but as yet unproven, charges of professional misconduct. The State's position is clear: Because the State has concluded that Dr. Chase is guilty as charged, it is unimportant that the Board's investigator falsified some of the

most important evidence against him, that the State has violated the Due Process Clause and directly applicable ethical rules, or that Dr. Chase's constitutional right to investigate and defend against the State's pending charges has been eviscerated.

This ends-justify-the-means argument, like the remainder of the positions advanced in the State's filing, is as dangerous as it is misguided. Dr. Chase's Motion is not intended to contest all of the unproven allegations advanced by the State in its Specification of Charges. Rather, it identifies far more serious, systemic defects in this proceeding: Uncontroverted facts and well-established law undermine the legitimacy of the Board's investigation and demonstrate that clear-cut misconduct by the Board's investigator and the State have forever deprived Dr. Chase of his constitutional right to fully defend against the State's allegations, whatever or however many they may be. That the State has generated a plethora of professional misconduct charges against Dr. Chase makes it even more important, not less important, that the State strictly observe the constitutional and ethical constraints on its behavior.

This Board must repudiate the State's "who cares" attitude and affirm that it treats proven allegations of misconduct by its own investigators and attorneys at least as seriously as it treats unproven allegations of misconduct by the doctors it regulates. It should reinstate Dr. Chase's license and dismiss the Superceding Specification of Charges with prejudice. No other remedy can assure medical professionals and consumers alike that the Board takes seriously its obligation to regulate doctors in an impartial manner. And no other remedy can even begin to repair the damage done to Dr. Chase's life, career, and constitutional rights by the State's illegitimate actions.

II. Discussion.

The State's Opposition is more notable for the issues it fails to address than for the ill-defined positions it bothers to advocate. Most importantly, the State offers no substantive

response to Amy Landry's sworn deposition testimony that the Board's investigator falsified the key charge in the affidavit the State crafted to support Dr. Chase's summary suspension—that Dr. Chase knowingly falsified the chart of Helena Nordstrom. Nor does it deign to address Ms. Landry's sworn, and now uncontested, allegation that the Board's investigator fraudulently obtained her affidavit by falsely telling her that her written statement was solely for his note-taking purposes and therefore she "did not have to worry about it being accurate." Instead, the State spends the majority of its Opposition attempting to duck its constitutional and ethical responsibilities, arguing that they do not apply in licensing proceedings where the State is merely attempting to destroy a doctor's livelihood and reputation. The State is wrong: The Constitution and caselaw make clear that Dr. Chase enjoys a due process right to a suspension proceeding unskewed by falsified evidence and unethical witness interference.

A. The Board's Investigator Falsified Ms. Landry's Affidavit Regarding The Single Most Important Issue Raised In The Summary Suspension Proceedings, And The State Has Offered No Credible Argument To The Contrary.

The primary governmental wrongdoing disclosed in Amy Landry's sworn deposition testimony was that the Board's investigator falsified her affidavit and then submitted that affidavit to the Board to support the State's Motion for Summary Suspension. That Motion was entirely premised upon the State's contention that Dr. Chase falsified the medical records of a single, former patient, Helena Nordstrom, to say that she wanted cataract surgery when in fact she did not. As even the State acknowledges, the primary support for its Motion was the sworn affidavit of Amy Landry, which explicitly stated: "Dr. Chase wrote [in Helena Nordstrom's chart] that she wanted cataracts removed when she did not." (Affidavit of Amy Landry ("Landry Aff") at 4 (emphasis in original).) However, at her deposition, Ms. Landry testified, in no uncertain terms, that ***she did not know if Dr. Chase had falsified Ms. Nordstrom's medical chart and did not tell the Board's investigator that he had.*** (Transcript of Dec. 22, 2003 Deposition of Amy Landry

("Landry Dep.") at 47-48, 49.) Indeed, Ms. Landry had no idea whether Ms. Nordstrom had informed Dr. Chase that she wanted her cataracts removed, because Ms. Landry played absolutely no part in the medical care given to Ms. Nordstrom. (Landry Dep. at 47-48.)

Conspicuously missing from the State's Opposition is any evidence that Ms. Landry actually made the statement recorded in the sworn "affidavit" the State crafted for her. Rather, the State engages in verbal acrobatics in an attempt to justify its misrepresentations to the Board, stating that what Ms. Landry ***really meant to say*** in her affidavit, and what the State ***really meant to tell the Board*** in its Summary Suspension Motion, was that Dr. Chase improperly charted certain test results, and that this charting practice "explains the inconsistency between [Dr. Chase's] measure of Helena Nordstrom's visual acuity and Dr. Morhun's results for visual acuity." (Opposition at 8.) Of course, in reality, neither Ms. Landry's affidavit nor the State's Summary Suspension Motion advanced such an unexceptional and nuanced position. Nor would such evidence have been sufficient to justify the draconian remedy of summary suspension. Accordingly, the State explicitly represented to the Board that Ms. Landry knew that Dr. Chase had falsified Ms. Nordstrom's chart and had made a sworn statement to that effect, (Landry Aff. at 4), when in reality Ms. Landry had no such knowledge and made no such statement. (Landry Dep. at 47-48, 49.) The record evidence permits no other rational conclusion: The State made explicit misrepresentations to the Board on the most central issue raised in the summary suspension hearing. No amount of after-the-fact rationalizing by the State can alter that undeniable fact.

B. The Remaining Inaccuracies In Ms. Landry's Affidavit Can Only Be Attributed To Improper Conduct On The Part Of The Board's Investigator.

In a rare, albeit begrudging, concession to the uncontested evidence, the State admits that the affidavit drafted for Ms. Landry's signature did not accurately record her testimony on other key points, including whether Dr. Chase "crafted" his medical records to force patients into

surgery, whether he utilized a "script" for his technicians, and whether he gave a "spiel" to his patients regarding the need for cataract surgery. However, rather than accepting responsibility for these misrepresentations, the State attempts to minimize their importance, labeling them "semantic differences" and "minor discrepancies." The State's mistaken position can be accurately summarized as this: Because Ms. Landry's subsequent deposition testimony is somewhat consistent with the pejorative averments the State inserted into her sworn affidavit, the Board investigator was justified in attributing those averments to Ms. Landry even though she did not actually make them and, in fact, objected to their inclusion. The State's position is wrong, and its lack of concern for the accuracy of the sworn evidence it submitted should cause the Board grave misgivings regarding the remainder of the State's evidence in this and future Board proceedings.

As an initial matter, the characterizations attributed to Ms. Landry in her affidavit are not "consistent with" her deposition testimony, as the State wishfully suggests. To the contrary, Ms. Landry has testified that the investigator's pejorative characterizations of her statements were inaccurate, unfair, and inconsistent with what she actually told him. Specifically, Ms. Landry testified at her deposition that: (1) it was false and unfair to characterize her index card as a "script," (Landry Dep. at 25, 28-29); (2) she did not characterize Dr. Chase's informed consent presentation as a "spiel," and there was nothing improper with Dr. Chase's practice of providing a standardized list of the risks and benefits of surgery to each cataract patient, (Landry Dep. at 23-24; 207-08), and (3) she did not know whether Dr. Chase "crafted records to force patients into cataract surgery," and certainly did not tell the investigator that he had done so. (Landry Dep. at 20-21.) Thus, the notion that the Board investigator accurately paraphrased Ms. Landry's actual statements and knowledge is untrue according to the affiant herself.

However, even if the investigator's characterizations of Ms. Landry's interview statements were consistent with her subsequent deposition testimony, that fact does not justify falsifying Ms. Landry's affidavit to contain statements that she did not make. The State treats Ms. Landry's affidavit as a malleable statement that can legitimately be manipulated by the State to fit its theory of the case. It is not. "An affidavit is defined as being a written statement, under oath, sworn to or affirmed by the person making it . . . ." State v. Knight, 549 P.2d 1397, 1401 (Kan. 1976). "The proper function of an affidavit is to state facts, not conclusions." Lindley v. Midwest Pulmonary Consultants, 55 S.W.3d 906, 909 (Mo. Ct. App. 2001). The sanctity accorded sworn statements is underscored by the Legislature's decision to impose criminal sanctions upon persons who breach their oath by giving false, sworn statements. See 13 V.S.A. § 2901-07. By treating Ms. Landry's affidavit as just another piece of written advocacy submitted to advance the State's position, the State has violated the trust of the Respondent, the citizens of Vermont, and the Board, and has called into question the fundamental assumptions that underpin any fair administrative proceeding.

Indeed, the State went out of its way to create the false impression that the characterizations in the affidavit were Ms. Landry's own. Although the Board's investigator actually drafted Ms. Landry's handwritten affidavit, it is phrased in the first person, thereby representing that it was Ms. Landry's own statement. (See Landry Aff. at 1 ("I worked for Dr. Chase for the past 11 months.") Most importantly, in its Suspension Motion, the Assistant Attorney General explicitly and unambiguously represented to the Board that the pejorative characterizations in the affidavit were Ms. Landry's own, stating, "Respondent would . . . begin ***what Ms. Landry characterizes as a 'spiel.'***" (Motion for Summary Suspension ¶ 25, citing Landry Aff. at 2 (emphasis added).) The State now explicitly admits that Ms. Landry did not "characterize" Dr. Chase's presentation as a "spiel," and implicitly acknowledges that its contrary

representation to the Board was false. Amazingly, even though the State has known with certainty since Ms. Landry's December 22, 2003 deposition that her affidavit is false, the Assistant Attorney General has taken no action to correct the State's misrepresentation to the tribunal. Because the State cannot muster the integrity to correct, rather than minimize, its prior misrepresentations, the Board must do so itself.

C. The State Offers No Response To Ms. Landry's Uncontroverted Testimony That The Board's Investigator Obtained Her Signature By Fraud.

Perhaps the single most surprising and disappointing aspect of the State's Opposition is its complete failure to offer any response to Ms. Landry's sworn deposition testimony that the Board's investigator induced her to sign the affidavit by fraud, telling her "that he was taking down notes as he wrote and that it was okay, that, you know, [she] didn't have to worry about it being accurate – exactly to [her] wording . . . ." (Landry Dep. at 34.) The State's failure to even mention, much less respond to, Ms. Landry's sworn allegations of fraudulent inducement by the investigator is indicative of its cavalier attitude toward all of the substantive and procedural deficiencies in this action. It is more than willing to ignore fraud by the Board's investigator as a means to achieve its desired end.

D. The State Does Not Begin To Rebut The Charge That Its Attorney Behaved Unethically.

In his Motion, Dr. Chase demonstrates that the State violated Vermont Rule of Professional Conduct 3.4(f), which plainly states that "***a lawyer shall not request a person other than a client to refrain from voluntarily giving relevant information to another party . . . .***" Vermont Rule of Professional Conduct 3.4(f) (emphasis added). The State does not deny that it sent letters to 27 of its most important witnesses, stating:

> Eric Miller, attorney for Dr. Chase, has sent or will send a letter to you requesting an interview or deposition. ***The State requests that you not speak with anyone from his office in an informal interview***. The State further requests that you allow us to arrange

> for the scheduling of any deposition Attorney Miller wishes to take.

(December 4, 2003 Letters from Joseph Winn to Witnesses (emphasis added).) Instead, the State's only response is to incorrectly claim that Dr. Chase "has not cited to a single case or Professional Responsibility Opinion . . . that supports [his] interpretation of" Rule 3.4(f). (Opposition at 15.) The State contends, contrary to the plain language of the Rule itself, that it is free to "request" that witnesses not speak with Dr. Chase's counsel, as long as it does not actually prohibit them from doing so.[1] Once again, the State's argument is patently incorrect.

As an initial matter, Dr. Chase does not need to rely on decisional law to support his "interpretation" of Rule 3.4(f). There is nothing to interpret. The plain language of the Rule prohibits an attorney from "requesting" a witness not to voluntarily provide relevant information to another party. Here, the State wrote nearly all of its witnesses, "requesting" that they not voluntarily meet with Dr. Chase's counsel to provide relevant information. It is difficult to imagine a more clear-cut and well-proven violation of the letter and spirit of Rule 3.4(f).

Moreover, there exists ample decisional law from courts and disciplinary bodies alike supporting the common-sense proposition that an attorney may not ethically request that a third-party witness refuse to voluntarily speak with opposing counsel outside the context of a formal deposition, whether in a criminal or civil action. The State need not actually "instruct" a witness against a voluntary interview in order to find itself in violation of this rule; a request, a suggestion, or advice to that effect is equally unethical. As one state bar disciplinary body succinctly put it: "It is professional misconduct for a prosecutor to ***request or advise*** a complaining witness to refrain from talking to the defendant or defense lawyer." State Bar of

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[1] The State also suggests that Dr. Chase is arguing that third-party witnesses must be compelled to speak with his counsel. (Opposition at 12.) Whether through a lack of understanding or candor, the State misconstrues Dr. Chase's argument. He does not contend that witnesses can or should be compelled to speak with his attorneys outside the presence of the State. Rather, Dr. Chase contends, and both the Rule and caselaw instruct, that he must be given an opportunity to request private interviews with witnesses, and those witnesses must be allowed to decide to be interviewed or not, without State interference in the form of a request or instruction.

Mich. Standing Comm. Professional and Judicial Ethics, Opinion No. RI-302 (October 20, 1997) (emphasis added). This "rule simply recognizes that, given the respect accorded [the State] by . . . witnesses, when such officials ***suggest*** that a witness not speak to the defense this may have the same practical effect as directly telling a witness not to do so." Davis v. State, 881 P.2d 657, 665 (Nev. 1994) (emphasis added).[2]

The deposition testimony of Dr. Vincent DeVita, another of the State's important witnesses, provides a compelling, real-world illustration of why the State may not even request that third-party witnesses decline to voluntarily speak with Respondent's counsel. Dr. DeVita interpreted the State's "request," sent on the official letterhead of the Attorney General of the State of Vermont, as a command:

> ***I didn't think of it as an elective thing. I thought it was the right thing to do. I mean it says the State of Vermont. They're telling me this is the right thing to do. That's why I did it.***

(DeVita Dep. at 176-77 (emphasis added).) The law pragmatically recognizes the reality exemplified by Dr. DeVita's testimony: Due to the State's inherent authority and coercive power, nearly every citizen is likely to heed the State's request that he or she not speak with opposing counsel. It is for that reason, among others, that both ethical rules and the Constitution alike prohibit the State from making such illegitimate use of its authority.

Finally, the State attempts to exploit Dr. Chase's carefully considered decision not to report the Assistant Attorney General to the Professional Responsibility Board before giving him one last chance to rectify his ethical violations. Vermont Rule of Professional Conduct 8.3(a) requires an attorney to report a colleague to the Professional Responsibility Board only when that colleague's ethical violations raise "a substantial question as to [his] honesty, trustworthiness, or

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[2] Notably, Rule 3.4(f) is not limited to the criminal context. Rather, by its very terms, it applies to all lawyers in all types of cases. See also Briggs v. McWeeny, 796 A.2d 516, 540 (Conn. 2002). The State wisely does not argue to the contrary.

fitness as a lawyer in other respects." V.R.P.C. 8.3(a). Here, despite the fact that Dr. Chase's attorneys had warned the State of the grave impropriety of its actions on at least two separate occasions,[3] they were willing to indulge the possibility that the State's ethical missteps were attributable to ignorance or confusion regarding its ethical duties, and that a formal Motion might prompt the State to recognize, admit, and attempt to remedy its ethical violation. Had that been the case, it would have been unnecessary to report the Assistant Attorney General to the Professional Responsibility Board. Unfortunately, the benefit of the doubt afforded the State was misplaced.

E. Due Process Entitles Dr. Chase To A Board Hearing Untainted By Falsified Evidence And Interference With Access To Witnesses.

As set forth above, the State spends precious little time attempting to show that it treated Dr. Chase in a manner consistent with ethical rules and the Due Process Clause. Instead, it squanders most of its Opposition on a futile argument that this Board proceeding is not subject to, and that the Board may therefore freely ignore, the constitutional prohibitions against utilizing falsified evidence and obstructing access to witnesses. The import of the State's overreaching argument is this: Respondents before the Medical Practice Board do not have a constitutional right to a proceeding untainted by falsified evidence and do not have a constitutional right to communicate with witnesses unimpeded by the State's unethical conduct. The State's position is not just wrong, it is irresponsible.

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[3] As noted in Dr. Chase's Motion, his counsel first objected to the State's improper witness interference in a December 11, 2003 letter. In addition, during a December 16, 2003 telephone status conference, Dr. Chase's counsel informed the State, the hearing panel, and the hearing officer that the State's letters to witnesses were improper. Unfortunately, the audiotape of that telephone status conference is largely inaudible and cannot be transcribed. On neither occasion did the State bother to perform even the most rudimentary scan of applicable ethical rules or caselaw, which would have quickly identified the legal rule of which the State had run afoul. The State's suggestion that it was Dr. Chase's duty to perform this research and provide the State with specific legal citations supporting his position is absurd. (Opposition at 15.) The simple fact is that Dr. Chase twice warned the State of the impropriety of its actions, but the State failed to heed that warning on both occasions.

The United States Supreme Court, the Vermont Supreme Court, and other state and federal courts from across the country, have made clear that administrative proceedings such as this are subject to the requirements of the Due Process Clause of the United States Constitution. See, e.g., Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976); Petition of N.E. Tel. & Tel. Co., 120 Vt. 181, 188 (1957) ("The essentials of due process permit administrative regulation only by adherence to the fundamental principles of constitutional government."); Lowe v. Scott, 959 F.2d 323, 334-35 (1st Cir. 1992); Colorado State Bd. of Med. Examiners v. Colorado Ct. of App., 920 P.2d 807, 812 (Colo. 1996).

Although a respondent in an administrative proceeding is not always guaranteed the full range of protections available to a criminal defendant, a proceeding before an administrative agency is always subject to at least the "***essentials of due process***." Petition of N.E. Tel. & Tel. Co., 120 Vt. at 188 (emphasis added). "The quasi-judicial [administrative] action . . . prescribed [by the due process clause] ***must faithfully observe the 'rudiments of fair play.'***" Id. (emphasis added). As one court recently stated, the "***relaxed procedure***" of an administrative proceeding "***is not a license to violate fundamental fairness***." Nichols v. DeStefano, 70 P.3d 505, 507 (Colo. Ct. App. 2002); see also Precious Metals Assoc., Inc. v. Commodity Futures Trading Comm'n, 620 F.2d 900, 910 (1st Cir. 1980) (due process mandates that an administrative hearing be conducted in accordance with fundamental principles of fair play); Silverman v. Commodity Futures Trading Comm'n, 549 F.2d 28, 33 (7th Cir. 1977) ("[T]he due process clause does insure fundamental fairness of the administrative proceeding."); Miklus v. Zoning Board, 225 A.2d 637, 641 (Conn. 1967) ("[T]he conduct of [an administrative] hearing shall not violate the fundamentals of natural justice."); Sohi v. Ohio State Dental Board, 720 N.E.2d 187, 192 (Ohio Ct. App. 1998) ("Procedural due process [in medical license suspension hearing] also embodies the concept of fundamental fairness.").

There is absolutely no question that the right to a proceeding free of evidence falsified by the State is an "essential" of due process, a "rudiment of fair play," central to notions of "fundamental fairness," and therefore fully applicable in an administrative proceeding. In the Supreme Court's words: the "principle that a State may not knowingly use false evidence" is so fundamental as to be "***implicit in any concept of ordered liberty***." Napue v. Illinois, 360 U.S. 264, 269 (1959) (emphasis added); see also United States v. Vozzella, 124 F.3d 389, 392 (2d Cir. 1997) ("The fundamental unfairness of a conviction obtained through the use of false evidence has long been recognized by the Supreme Court."). Although, here, the State appears to have not yet grasped the concept, "***the wrongfulness of charging someone on the basis of deliberately fabricated evidence is . . . obvious***." Devereaux v. Abbey, 263 F.3d 1070, 1075 (9th Cir. 2001) (emphasis added). As these cases demonstrate, no State-initiated deprivation of property rights complies with the Due Process Clause to the extent it is based on falsified evidence. That the State would even argue to the contrary speaks volumes regarding its attitude toward the fairness of this proceeding.

Similarly, the right to seek private interviews with relevant witnesses without interference by the State is an essential component of due process and an element of fundamental fairness, and is therefore fully applicable in an administrative proceeding. "***Elemental fairness and due process require***[] that" a defendant be allowed an opportunity to interview State witnesses without interference by the State. Gregory v. United States, 369 F.2d 185, 188 (D.C. Cir. 1966); cf. United States v. Tsutagawa, 500 F.2d 420, 423 (9th Cir. 1974) (notion that government cannot place witnesses beyond reach of defense is "to prevent basic unfairness"). This principle is a "dictate" of "notions of fair play and due process." Coppolino v. Helpern, 266 F. Supp. 930, 935 (S.D.N.Y. 1967). Because this common sense rule promotes the quest for truth, and discourages gamesmanship by attorneys, it is equally applicable in civil and criminal matters. See Gregory,

369 F.2d at 188; Coppolino, 266 F. Supp. at 935 (truth-seeking goal of witness interference rule is as important "in a criminal manner [as] in a civil matter"). The State's argument to the contrary, unsupported by law or reason, is incorrect.

While the State's misconduct in this case is egregious, its failure to recognize that fact and take immediate steps to rectify its wrongdoing is of equal concern. Rather than renounce and correct its improper conduct, the State has vainly attempted to defend it and has even threatened to take additional steps to protect the ill-gotten advantages it has accrued from the misconduct. Specifically, it threatens that even if the Board were to reinstate Dr. Chase's license due to the investigator's misconduct, the State would simply renew its Motion for Summary Suspension based on other evidence gathered since the suspension by the same investigator. (Opposition at 3.) This position cogently demonstrates the danger the State's hubris poses to justice in this matter. Even though the Attorney General's Office firmly believes that Dr. Chase is guilty as charged, he is still entitled to the procedural protections guaranteed him by the United States Constitution and other applicable laws. The State's belief that Dr. Chase engaged in unprofessional conduct, no matter how deeply held, cannot trump those rights.

F. Dismissal Is The Only Effective Remedy For The Constitutional And Ethical Violations Committed By The Board's Investigator And The State.

The State next argues that even though dismissal might be warranted if this were a criminal case, it is unwarranted in this administrative proceeding. However, all of the policies that require dismissal in the face of government misconduct in criminal cases apply with equal or greater force here.

As an initial matter, tribunals in both criminal and civil cases are justified in dismissing charges in order to protect the integrity of the tribunal or the process itself from the dangers associated with demonstrated litigation misconduct. United States v. Hogan, 712 F.2d 757, 761 (2d Cir. 1983); Shepherd v. American Broadcasting Companies, Inc., 62 F.3d 1469, 1472 (D.C.

Cir. 1995) (courts have "inherent power" to dismiss for "litigation misconduct" in order "to protect their institutional integrity and to guard against abuses of the judicial process"). This policy weighs even more heavily in favor of dismissal where, as here, the adjudicative body also performs the investigative and prosecutorial functions. Because the Board acts as prosecutor, judge, and jury, it must go to great lengths to protect its proceedings from bias or even the appearance of bias. When confronted with sworn and uncontested allegations of misconduct by its investigator and attorney, the Board must act quickly and decisively to correct any prejudice caused to the Respondent and to the integrity of the proceedings. Its failure to do so will validly raise the specter of bias and provide support for the notion that the Board is unfairly protecting its own employees and agents to the prejudice of the rights of medical professionals.

Second, tribunals regularly dismiss charges—regardless of whether or not they are meritorious—when faced with government misconduct because the extreme danger posed by State-sponsored misconduct justifies the use of stern measures to inhibit its practice. See, e.g., United States v. Brodson, 528 F.2d 214, 216 (7th Cir. 1975) (dismissal of charges is "ultimate sanction for the Government's failure to act properly"); United States v. Dahlstrum, 493 F. Supp. 966, 975 (C.D. Cal. 1980) ("dismissal is mandated by the overwhelming evidence of the [government's] flouting" of applicable rules). As these cases demonstrate, when faced with government misconduct, courts will dismiss charges against people charged with the most serious of crimes. That same government misconduct easily justifies dismissal of administrative charges of professional wrongdoing. This Board must make clear that it will not tolerate fabricating evidence or obstructing access to witnesses. The nonchalant response of the State when confronted with its illegal conduct makes clear that it has not yet assimilated that basic message. The Board must dismiss the charges not only to remedy violations of Dr. Chase's

constitutional rights, but to protect future respondents from suffering the same sort of abuse at the hands of an unrepentant State.

Finally, as discussed at length in Dr. Chase's Motion, reinstatement and dismissal are appropriate because they are the only sanctions that can even begin to remedy the harm inflicted upon him. See Hogan, 712 F.2d at 761; United States v. Banks, 383 F. Supp. 389, 391 (D.S.D. 1974). The Board investigator's falsification of evidence led directly to the summary suspension of Dr. Chase's license, the abrupt termination of his career, and the destruction of his reputation in the community where he lives. Although the Board cannot completely resurrect Dr. Chase's career or his reputation, it can ameliorate the extraordinary damage caused by the government's misconduct. Even more importantly, the State's letters and telephone calls to witnesses undeniably have hindered, and will continue to hinder, Dr. Chase's ability to investigate the charges against him and to prepare his defense. Because the witness pool has been poisoned against Dr. Chase, and because the State's witnesses cannot be compelled to meet with Dr. Chase's attorneys outside of the State's presence, there is simply no way that Dr. Chase can now fully investigate and defend against the charges facing him, as required by due process.

G. The Board Has The Authority To Dismiss The Charges It Brought.

In an anomalous argument that epitomizes the State's dangerous misperception of itself as the sole arbiter of Dr. Chase's fate in this matter, the State contends that although the Board has the authority to bring career-ending charges against Dr. Chase, it is powerless to dismiss those charges even after it discovers they are corrupt. Instead, the State contends that only ***it*** has the power to dismiss charges prior to a formal merits hearing, regardless of the integrity of the evidence or the propriety of the State's actions in prosecuting them. This argument

thoroughly understates the Board's authority and offends both common sense and the controlling statutory language.

As an initial matter, the Board's enabling legislation clearly contemplates that the Board may dismiss charges against a Respondent for reasons apart from guilt or innocence:

> If a person complained of is found not guilty, ***or the proceedings against him are dismissed***, the Board shall forthwith order the dismissal of the charges and the exoneration of the person complained against.

26 V.S.A. § 1361(c) (emphasis added). This plain language interpretation of section 1361(c) does not create superfluity in the statute, as the State strains to argue. Rather, section 1361 simply makes clear that if the Board determines that dismissal is appropriate, it "***shall***" formally order the dismissal and formal exoneration of the respondent. Put differently, the statute sensibly provides the Board with no choice other than dismissal when the facts and law require.

The remainder of the Board's enabling legislation, as well as controlling caselaw, support this common sense reading of section 1361(c). In laying out the "powers and duties of the Board," 26 V.S.A. § 1353 makes clear that the Board may "undertake any such other actions or procedures . . . required or appropriate to carry out, the provisions of this chapter." 26 V.S.A. § 1353(4). And as even the State acknowledges, this Board has both the powers "expressly conferred upon it by the Legislature" and "such incidental powers . . . necessarily implied as are necessary to the full exercise of those granted." Perry v. Medical Practice Board, 169 Vt. 399, 403 (1999). Here, the Board has the power to bring charges of unprofessional conduct against a medical professional. See 26 V.S.A. § 1356. The Board also has the power to regulate the disciplinary proceedings before it. 26 V.S.A. § 1353. The power to bring charges against a doctor and to regulate the disciplinary proceedings necessarily carries with it the power to terminate those proceedings by dismissing the charges when the facts and the law require.

The State's contempt for Dr. Chase's rights and this Board's authority is manifest in its argument that, prior to a merits hearing, "the Board must enter a dismissal [only] if ***the State*** dismisses the proceedings against the Respondent." (Opposition at 4 (emphasis in original).) The State's conception of its own omnipotence is mistaken: The Board serves as more than a handmaiden to the prosecutor in these proceedings. Acting in its judicial capacity, the Board may dismiss the charges as required by the facts and law, and it may do so without first obtaining the State's permission. Nowhere is the Board's inherent authority to dismiss more important than when, as here, the reason for dismissal is the intentional misconduct of the State itself. To allow the State alone to pass judgment on the propriety of its own actions would be to render the Respondent's right to a hearing free of governmental misconduct utterly meaningless.

H. The State's Efforts To Deflect Attention From Proven Wrongdoing Are Dangerous, Offensive, And Ultimately Unavailing.

Throughout its Opposition, the State attempts to divert the Board's attention from the uncontroverted misconduct of its investigator and attorney by reiterating, over and again, that it has charged Dr. Chase with 136 counts of misconduct set forth in several hundred paragraphs in the Superceding Specification of Charges. (See Opposition at 1, 2, 3, 5, 6, 10, 15, 16, 17.) But Dr. Chase's rights do not diminish as the State increases the number of charges against him. The common theme uniting the arguments employed by the State to rationalize its own infringements is that Dr. Chase's rights are of no concern because he is in fact guilty of the charges leveled against him. Such reasoning is premised on a contemptuous and cynical view of the law that would arrogate to the State the sole authority to determine Dr. Chase's guilt.

Dr. Chase's Motion to Dismiss is far more elemental in purpose than a simple challenge to the evidence the State has submitted: The State's misconduct in fabricating evidence and obstructing access to witnesses has undermined the legitimacy of the Board's entire investigation

and has deprived Dr. Chase of his constitutional right to defend himself against the State's allegations in a full, fair and meaningful way. From the outset, Dr. Chase has demanded nothing more than a fair opportunity to address the substance of the charges against him, but the actions of the State have made it impossible for him to do so. The fact that Dr. Chase faces a large number of career-ending charges imposes upon the State a heightened, not diminished, duty to strictly observe the constitutional and ethical constraints on its behavior. Unfortunately, the State has failed to fulfill that duty, and that failure can only be remedied through reinstatement of Dr. Chase's license and dismissal of the charges against him.

III. Conclusion.

For the reasons discussed above, Dr. Chase respectfully requests that the Board reinstate his medical license and dismiss the Superceding Specification of Charges.

Dated at Burlington, Vermont, this 5th day of March 2004.

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